

ARKANSAS SUPREME COURT

No. CR 06-1188

NOT DESIGNATED FOR PUBLICATION

LARRY PETERS
Petitioner

v.

STATE OF ARKANSAS
Respondent

Opinion Delivered December 14, 2006

PRO SE MOTION FOR BELATED
APPEAL [CIRCUIT COURT OF
NEVADA COUNTY, CR 2004-152]

REMANDED.

PER CURIAM

A judgment and commitment order entered on July 22, 2005, indicates that petitioner Larry Peters was found guilty by a jury of possession of a controlled substance (cocaine) with intent to deliver, delivery of a controlled substance (cocaine), possession of drug paraphernalia, and theft by receiving, and that he received an aggregate sentence of 20 years' or 240 months' imprisonment in the Arkansas Department of Correction. Proceeding *pro se*, petitioner has now tendered a partial record to this court and brings this motion for belated appeal of that judgment.

A petitioner has the right to appeal the judgment. *See Scott v. State*, 281 Ark. 436, 664 S.W.2d 475 (1984) (*per curiam*). However, along with that right, goes the responsibility to timely file a notice of appeal within thirty days of the date the order was entered in accordance with Ark. R. App. P.—Civ. 4 (a). The partial record before us shows no notice of appeal of the July 22, 2005, order. Petitioner has attached an uncertified copy of a notice of appeal filed on August 26, 2005, which would, in any case, fall outside the thirty-day period ending on August 22, 2005. Petitioner

therefore must seek to belatedly file his appeal under Ark. R. App. P.–Crim. 2 (e).

If a petitioner fails to timely file a notice of appeal, a belated appeal will not be allowed absent a showing by the petitioner of good cause for the failure to comply with proper procedure. *Garner v. State*, 293 Ark. 309, 737 S.W.2d 637 (1987) (*per curiam*). Petitioner’s motion indicates that he informed his attorney that he desired to appeal. Relief from the failure to perfect an appeal is provided as part of the appellate procedure granting the right to an appeal. *McDonald v. State*, 356 Ark. 106, 146 S.W.3d 883 (2004). Where it is plain from the motion, affidavits, and record that relief is proper under Rule 2(e), based upon error or good reason, this court will grant a belated appeal. *Id.* When a criminal defendant requests a belated appeal, good reason is established where the defendant is not at fault, and his or her attorney has failed to file a timely notice of appeal following a request to do so received within the requisite time to file a notice of appeal. *See Williams v. State*, ___ Ark. ___, ___ S.W.3d ___ (June 15, 2006) (*per curiam*).

In keeping with our practice, petitioner’s attorney, Mr. Billy Moritz, was provided a copy of petitioner’s motion and asked to provide an affidavit in response to petitioner’s allegations. Mr. Moritz has now responded, and disputes petitioner’s claim that he advised Mr. Moritz that he wished to appeal the judgment.

Under Ark. R. App. P.–Crim.16(a), once an attorney represents a defendant, the attorney is obligated to continue representing the defendant until relieved by the appropriate court. *See Hammon v. State*, 347 Ark. 267, 65 S.W.3d 853 (2002). There is no indication in the record that Mr. Moritz was relieved by the trial court. If there was no order otherwise relieving Mr. Moritz from his obligation to perfect the appeal, Mr. Moritz was obligated to file a timely notice of appeal, lodge the record in the appellate court and continue in his representation of petitioner. *See Rogers v. State*, 353

Ark. 359, 107 S.W.3d 166 (2003) (*per curiam*). It is well settled that under no circumstances may an attorney who has not been relieved by the court abandon an appeal. *Id.* at 361, 107 S.W.3d at 167.

However, this court has held that a defendant may waive the right to appeal by his or her failure to inform counsel of the desire to appeal within the thirty days allowed for filing a timely notice of appeal. *Strom v. State*, 348 Ark. 610, 74 S.W.3d 233 (2002). If, indeed, petitioner did instruct Mr. Moritz that he wished to appeal, the fact that Mr. Moritz did not perfect the appeal would clearly indicate that he had failed in his duty to petitioner. *See id.*; *Gooden*, 344 Ark. at 292, 40 S.W.3d at 272. If, however, the trial court determines that petitioner did not advise Mr. Moritz within thirty days of the date the judgment was entered that he wished to appeal the judgment, then the fault lies with petitioner, and belated appeal is not appropriate.

As petitioner has alleged that he instructed counsel to file an appeal, but counsel disputes that allegation, we remand to the circuit court to conduct a hearing and provide findings of fact on the issue of whether petitioner advised Mr. Moritz to appeal within thirty days of the date the judgment was entered. Because we also do not know whether counsel was relieved, we additionally instruct that the trial court provide findings on that issue, as well. Those findings should be provided to this court within sixty days of the date of this order, along with the record of the proceedings.

Remanded.